Supreme Court, U.S.
FILED
02-758 NOV 13 2002
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

METRO EAST CENTER FOR CONDITIONING AND HEALTH,
Petitioner,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

Whether a tariff containing an arbitration provision constitutes a "written agreement to arbitrate" under the Federal Arbitration Act.

Whether the Federal Communications Commission has exclusive jurisdiction to determine the arbitrability of a claim simply because the arbitration provision at issue is contained in a tariff.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is the Metro East Center for Conditioning and Health ("MECCAH"), an Illinois corporation with its principal place of business in the Southern District of Illinois. There is no parent or publicly held company owning 10% or more of MECCAH's stock. MECCAH was the Plaintiff in the District Court, and the Appellee in the Seventh Circuit Court of Appeals.

Respondent

Respondent is Qwest Communications International, Inc. ("Qwest"). Petitioner is unaware of any parent or publicly held company owning ten percent (10%) or more of Qwest's stock. Respondent Qwest was the Defendant in the District Court, and the Appellant before the Seventh Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Seventh Circuit opinion (App. B at 3a) is reported at 284 F.3d 924 (7th Cir. 2002). The District Court opinion (App. C at 16a) is reported at 182 F.Supp.2d 726 (S.D. Ill. 2002).

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on June 27, 2002. The Court of Appeals entered an order denying a timely petition for rehearing *en banc* on August 16, 2002 (App. A at 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 9 U.S.C. § § 1, et seq, the Federal Arbitration Act

9 U.S.C. § 3 provides that "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an

agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

9 U.S.C. § 4 provides that "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner

provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

B. 47 U.S.C. § § 151, Federal Communications Act.

47 U.S.C. § 203(c) states, "No carrier, unless otherwise provided by or under authority of this Act, shall engage, or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect . . .."

47 U.S.C. § 206 of the Federal Communications Act provides that "In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which

attorney's fee shall be taxed and collected as part of the costs in the case."

47 U.S.C. § 207 provides that "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

STATEMENT OF THE CASE

MECCAH is a former long-distance subscriber of Qwest having a particular type of multi-line business telephone configuration called Centrex. On June 19, 2001, MECCAH filed a Complaint against Qwest in the United States District Court for the Southern District of Illinois, asserting two causes of action under the Federal Communications Act ("the Communications Act"). The district court had jurisdiction under 47 U.S.C. § 207 and 28 U.S.C. § 1331.

Count I alleged that Qwest violated a federal regulation (47 C.F.R. § 69.153(e)) by charging its long-distance subscribers who have Centrex a Presubscribed Interexchange Carrier Charge ("PICC") in excess of the maximum amount specified in the regulation. In Count II, MECCAH alleged that Qwest violated the Communications Act by charging a PICC greater than the rate specified in Qwest's tariff. On September 4, 2001, MECCAH voluntarily dismissed Count I. Thus, the only claim remaining in this lawsuit is that MECCAH is entitled to recover damages,

attorneys' fees and costs under § 203(c) of the Communications Act because Qwest violated its own tariff in charging the higher PICC rate.

On September 14, 2001, Qwest moved to compel arbitration, citing an arbitration provision in its Tariff FCC No. 3 – the tariff governing Qwest's long-distance service. MECCAH opposed the motion on several grounds, including 1) that the arbitration provision contained in the tariff specified that the arbitrability of claims was to be governed by the Federal Arbitration Act ("the FAA"), 9 U.S.C. §§ 1, et seq., and that under the circumstances of this case there was no written agreement for arbitration as required by the FAA; 2) that the arbitration provision forced MECCAH to bear costs and fees in such disproportion to its claim that the claim was not arbitrable under case law interpreting the FAA; and 3) that the claim was not arbitrable under judicial precedent interpreting the FAA because the arbitration provision precluded MECCAH from seeking remedies guaranteed by federal statute, namely the right to seek attorneys' fees and costs under § 206 of the Communications Act.

The district court denied Qwest's motion to compel arbitration. The district court held, as a matter of first impression in the country, that an arbitration provision contained in a tariff, standing alone, did not constitute a written agreement for arbitration as required by the FAA. *Metro East Center for Conditioning and Health v. Qwest Communications International, Inc.*, 182 F.Supp.2d 726, 729 (S.D. Ill. 2002). The court reasoned that a written agreement for arbitration necessarily implies mutual assent, but that mutual assent was lacking as the arbitration provision was contained in a non-negotiable tariff. *Id.* Because its finding that no written agreement to arbitrate existed between the parties in this case mandated a ruling in favor of MECCAH,

the district court did not reach MECCAH's other arguments regarding the enforceability of the arbitration provision under the circumstances of this case. *Id.* at 728, fn 1.

Qwest appealed the district court's decision to the Seventh Circuit. The panel of judges assigned to the case reversed the district court, holding that an arbitration provision contained in a tariff constitutes a written agreement for arbitration for purposes of the FAA. *Metro East Center for Conditioning and Health v. Qwest Communications International, Inc.*, 294 F.3d 924, 926-927 (7th Cir. 2002). The panel characterized MECCAH's arguments as to the excessive arbitration costs and fees imposed by the arbitration provision as the "type of litany that the Federal Arbitration Act is supposed to silence," but held that such an argument had to be presented to the FCC in the first instance under the filed rate doctrine. *Id.* at 927. The panel also avoided MECCAH's argument that the arbitration provision was unenforceable because it precluded MECCAH from vindicating its statutory rights under the Communications Act by holding that the FCC possesses exclusive authority to decide whether Qwest's tariff "transgresses some aspect of the federal statutes that the FCC administers." *Id.* at 927-28. Thus, the panel concluded that the district court should have granted Qwest's motion to compel arbitration. MECCAH timely petitioned for rehearing *en banc*, which was denied on August 16, 2002.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit Has Decided Important Questions of Federal Law With Far-Reaching and National Implications That Have Not Been, but Should Be, Settled by this Court

This case involves two questions of exceptional and national importance. The Seventh Circuit's answer to these questions eradicates the FAA's requirement of a written agreement to arbitrate and effectively eliminates private enforcement of federally protected rights under the Federal Communications Act (the "Communications Act"), 47 U.S.C. § § 151, et seq., and by implication, enforcement of other federal or state statutes involving other tariffed industries.[1] As a result of the prevalence of tariffing, the Seventh Circuit's erroneous ruling will have impact far beyond the parameters of this litigation.

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[1] This would include the entire utility industry, including providers of electricity, water, natural gas, steam, sewer and telephone service as well some cable providers. *See, e.g.*, Cal. Pub. Util. Code § 489; Fla. Stat. Ann. § 366.06, N.Y. Comp. Codes R. & Regs. tit. 16, § 720-1.3; 220 ILCS § 5/2-102; Tx. Util. Code Ann. § 32.101 (electricity); Tx. Util. Code Ann. § 52.251 (telecommunications); Tx. Util. Code Ann. § 13.136 (water).

Most, if not all of the transportation industry would be included as well, including, for example, motor carriers, 49 U.S.C. § 13710(a)(1); rail carriers, 49 U.S.C. § 11101; carriers of household goods, 49 U.S.C. § 13702; air carriers, 49 U.S.C. § 41504, etc.

The first question in this case is whether a filed tariff containing an arbitration clause constitutes a "written agreement for arbitration" as required by the Federal Arbitration Act ("the FAA"), 9 U.S.C. § § 1, et seq. A panel of the Seventh Circuit wrongly held that it does. The second question is whether the Federal Communications Commission ("the FCC") has exclusive jurisdiction over questions regarding the enforceability of an arbitration provision contained in a tariff under the filed-rate doctrine. The panel erroneously held that it would invade the province of the FCC for a court to decide the enforceability of an arbitration provision contained in a tariff, even though that very provision invokes the FAA.[2]

The Seventh Circuit's opinion ignores relevant case law and fails to analyze whether its result furthers the goals of the filed-rate doctrine or the FAA. Further, the Seventh Circuit's opinion judicially repeals the private enforcement provisions of the Communications Act, and gives license to every telecommunications company in the country (and any other company in a tariffed industry) to bilk their customers without fear of meaningful repercussion, so long as they only steal a small amount from each customer and insert an arbitration clause in their tariffs by fiat.

The Seventh Circuit's position, taken to its logical extreme, would theoretically allow Qwest to charge all of its

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[2] De-tariffing does not moot the issues in this case. The Seventh Circuit's erroneous holdings apply with equal force to customer service agreements in a de-tariffed environment. *See Boomer v. AT&T Corp.*, — F.3d —, 2002 WL 31202126 (7th Cir. 2002) (enforcing arbitration provision in AT&T's customer service agreement mailed to its long distance customers following de-tariffing).

customers a one-time $250 "user-fee" to help it recover from its current financial woes, a charge not mentioned in Qwest's tariff. If the Seventh Circuit's opinion is allowed to stand, Qwest's customers would have no way to recover their $250. No one in his right mind would arbitrate such a small claim when it costs him ten times that much to do so. The FCC would not decide the propriety of the charge (on an individual or class basis) because it would not be a challenge to the reasonableness of a tariff provision. The door to the federal courthouse has been closed by the panel, because Qwest has an arbitration provision in its tariff. So Qwest would get to keep the millions of dollars it raised by charging the unlawful fee. The inequity and sweeping impact of the Seventh Circuit's result is obvious.

A. *The Seventh Circuit Erroneously Held that A Tariff Containing an Arbitration Provision Constitutes a "Written Agreement for Arbitration" as Required by the FAA.*

The Seventh Circuit held that MECCAH agreed to arbitrate its claim against Qwest because it "accepted" services that were governed by a filed tariff. In so holding, the court likened tariffs to form contracts, noting that arbitration provisions in form contracts are frequently enforced even though they are offered on a take-it-or-leave-it basis. The court then avoided any meaningful contractual analysis by noting that "by virtue of federal law a tariff is more conclusive than a contract and is said to have the status of a regulation." *Metro East*, 294 F.3d at 926. This holding makes new law that eviscerates the FAA's requirement that a person can be compelled to arbitrate *only* if he has entered into a "written agreement for arbitration." 9 U.S.C. § 3, 4.

1. The Cases Cited by the Seventh Circuit in Support of its Holding Do Not Support That Holding.

First, the Seventh Circuit's decision lacks support in any decisions of this Court or any other court. Some of the cases the Seventh Circuit cited in support of its holding involved arbitration clauses in ordinary *contracts*. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999) (enforcing arbitration provision in employment contract that plaintiff had signed); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (enforcing arbitration provision in form contract shipped to plaintiff in same box as computer he had purchased).

The Seventh Circuit stretched the holdings of these cases to the breaking point. Tariffs are not garden-variety contracts. While both are unilaterally drafted and non-negotiable, the comparison ends there. A form contract is typically one or two pages long. Qwest's tariff is over four hundred pages long. A person is provided with a print copy of a form contract at the time of signing, and is therefore presumed to have read and understood its terms and made a decision that the benefits of accepting the contract outweigh any undesirable and non-negotiable terms of the contract. A tariff is filed with a governmental agency in Washington, D.C. There is little likelihood that any of Qwest's customers have even seen Qwest's tariff, much less waded through the over 400 page document to try to find the unindexed and unlabelled arbitration clause buried within. In sum, Qwest's customers cannot be said to have made an informed decision to accept the arbitration clause, even on a take-it-or-leave-it basis, as is the situation with a form contract. Cases involving form contracts do not support the Seventh Circuit's holding with regard to tariffs.

None of the other cases cited by the Seventh Circuit can fairly be read to support its holding either, because none even deal with the enforceability of arbitration provisions in form contracts. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing *a forum selection clause* included in terms attached to three-page passenger ticket); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (involving the issue of whether arbitration provisions are generally enforceable *in the employment context*); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (involving the issue of whether the FAA preempts a state law prohibition against arbitral awards of punitive damages); *J.E. Liss & Co. v. Levin*, 201 F.3d 848 (7th Cir. 2000) (interpreting NASD rule providing for six-year statute of limitations in arbitrable disputes). These cases do not support the Seventh Circuit's holding that by unwittingly accepting services from a company whose tariff contains an arbitration provision, a person has entered into a written agreement to arbitrate within the meaning of the FAA.

In fact, there is no law supporting the Seventh Circuit's holding. MECCAH has been unable to locate a single reported case on the issue of whether a tariff containing an arbitration clause satisfies the FAA's requirement of a written agreement for arbitration.[3]

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[3] Although the issue was raised in *MCI Telecomm. Corp. v. Exalon Indus., Inc.*, the First Circuit found it unnecessary to reach the issue. 138 F.3d 426, 431 n. 3 (1st Cir. 1998).

2. *The FAA Requires an Agreement to Arbitrate and MECCAH Did Not Agree to Arbitrate by Accepting Long Distance Services from Qwest.*

In addition to lacking any legal support, the Seventh Circuit's holding violates the spirit of the FAA under which a person can be compelled to arbitrate only if he or she has agreed to do so. Qwest's Tariff FCC No. 3 provides that the FAA, not state law, governs the arbitrability of all claims. And "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 764 (2002) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

This Court has repeatedly stressed that "arbitration... is a matter of consent, not coercion." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995). In *First Options of Chicago, Inc. v. Kaplan*, this Court emphasized that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." 514 U.S. 938, 943 (1995); *see also AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") On the facts of this case, MECCAH cannot be held to have agreed to arbitrate its claim against Qwest under any reasonable definition of the word "agree."

MECCAH did not select Qwest as its long distance carrier. When it switched local carriers, it simply began receiving bills for long distance services from Qwest. *See* Pl.'s Answers and Obj. to Interrogs. at No. 3 (Ex. A to Doc. 50). MECCAH remained with Qwest only five months, but in that short time was improperly charged by Qwest to the tune of $80. *See* Pl.'s Ans. and Obj. to Interrogs. at No. 2 and Pl.'s Res. to Req. to Admit at No. 5 (Ex. A to Doc. 50). It was only when MECCAH unearthed Qwest's violation of its own tariff and sued to enforce that tariff that MECCAH learned Qwest had attempted to insulate itself from liability for its wrongdoing by inserting an arbitration clause into its tariff. *See* Crass Aff., ¶7 (Ex. D to Doc. 50).

Qwest did nothing to make its customers aware of the arbitration clause in its tariff. Tariff FCC No. 3 is over 400 pages long, with the arbitration clause buried somewhere in the middle. There is no mention of the arbitration clause in the tariff's Table of Contents, nor is the arbitration clause itself clearly marked. It constitutes several unlabeled paragraphs under the Terms and Conditions subpart of the "Rules and Regulations" section of the tariff. The tariff was never distributed to Qwest's customers – it was filed with the FCC in Washington, D.C. Qwest admitted that it does not know whether it made any effort to ensure customers knew of the arbitration clause, and that there is no evidence of any such efforts. *See* Brinton Dep., p. 37-40 (Ex. E to Doc. 50).

MECCAH refuses to believe that any rational court would enforce an unlabelled arbitration clause buried in the middle of a document that is 400 pages long and a copy of which is never supplied to the other party. The FAA's goal of eradicating judicial hostility to arbitration most certainly does not mandate such an inequitable result. But that is exactly what the Seventh Circuit did. Recognizing that a true

contractual analysis would not support arbitration in this case, the Seventh Circuit latched onto the filed-rate doctrine to justify its decision.

3. *The Filed-rate Doctrine Should Not Govern in this Case.*

The filed rate doctrine was intended to ensure non-discrimination in rates and services. *See AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998). However, Qwest's arbitration clause does not dictate the terms and conditions of MECCAH's long distance service. It merely selects the forum in which any disputes will be resolved. Moreover, the arbitration clause does not invoke the filed-rate doctrine with respect to whether a claim can be arbitrated, it invokes the FAA.

In answering the question in this case solely by pointing to the filed-rate doctrine, the Seventh Circuit overlooked the fact that an arbitration provision is not just another garden-variety rate or condition of long-distance service. On the contrary, Qwest's arbitration provision forecloses a successful plaintiff from recovering fees and costs, something it would be able to do in a court of law pursuant to the fee-shifting provision of the FCA. *See* 47 U.S.C. § 206. As a result, Qwest's arbitration provision forces its customers to waive federally protected remedies. Arbitration does not provide a viable alternative to courts under these circumstances.[4]

Further evidence that arbitration clauses are not garden-variety rates and conditions of long distance service is

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[4] See discussion at Section B.1, *infra*.

found in the fact that there is a specific federal statute (the FAA) requiring a written agreement for arbitration before arbitration can be compelled. To MECCAH's knowledge, there is no federal statute requiring that a party specifically agree in writing to any other kind of term or condition a long-distance carrier might wish to include in its tariff.

It is a mystery how enforcing such an arbitration clause promotes the underlying goals of the filed-rate doctrine. As a matter of fact, enforcing arbitration provisions against the customers of a company in a tariffed industry defeats the goals of the filed-rate doctrine by forcing disputes to be heard in secret arbitration proceeding which would allow for the exact type of discrimination the filed-rate doctrine was intended to shield against.

The Seventh Circuit ignored the only reported case in the country directly addressing this issue, albeit in dicta. *See Ting v. AT&T*, 182 F.Supp.2d 902 (N.D. Cal. 2002). In *Ting*, the district court was confronted with an arbitration provision that AT&T inserted in its "consumer services agreement" following de-tariffing. One of AT&T's long distance customers sought to enjoin AT&T from adopting the consumer services agreement, attacking the mandatory arbitration provision on various California state law theories. *Id.* at 906, 921. AT&T argued that to ensure uniformity of service throughout the nation, the filed-rate doctrine required preemption of any state law claims challenging the rates, terms and conditions specified in filed tariffs, including the purported arbitration provision. *Id.* at 936. The *Ting* court flatly rejected this argument, stating:

> It is ironic that AT&T makes this argument in an effort to impose mandatory arbitration since it is hard to see how the goal of uniformity is

> advanced if the rates, terms and conditions of service are being judged by arbitrators making unreported and largely unreviewable decisions.

Id. at 937 n. 23. The Court also noted:

> In interpreting Congress' intent [with respect to the purpose of the filed-rate doctrine], the Supreme Court was concerned with the potential for carriers charging discriminatory rates to, or imposing discriminatory terms on, their customers, not with whether their customers were able to resolve disputes before a court or an arbitrator...

Id. at 937. The *Ting* Court concluded that the filed-rate doctrine was not intended to cover tariff provisions such as arbitration clauses.

The Seventh Circuit's opinion does not mention *Ting*, even though *Ting* was extensively discussed in MECCAH's brief and at oral argument and provides cogent and persuasive analysis of whether the purposes of the filed-rate doctrine are served by enforcing arbitration clauses in tariffs.[5] Instead of thoughtfully analyzing the issues raised by MECCAH, the Seventh Circuit mechanically applied the filed-rate doctrine. In doing so, the Seventh Circuit turned a blind eye to the fact that compelling arbitration on the basis of language in a tariff, with nothing more to indicate that the party opposing arbitration agreed to arbitration, thwarts the core purposes of the filed-rate doctrine (protecting customers from

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[5] The Seventh Circuit's decision offers no analysis of the purposes of the filed-rate doctrine vis-a-vis the arbitration clause.

overreaching by common carriers) *and* the FAA (ensuring that only persons who agree to arbitrate their disputes can be compelled to do so).

4. The Purposes of the FAA and the Filed Rate Doctrine Are Best Served by Interpreting Qwest's Arbitration Provision as Providing a Uniform Framework for the Arbitration Procedure for Those Customers Who Have Otherwise Agreed to Arbitrate.

Again, the filed-rate doctrine promotes uniformity in a carrier's rate-making and pricing. *See AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. at 223. The FAA is intended to eradicate judicial hostility against arbitration, not manufacture arbitration agreements where none exist. If a long distance customer enters into a written agreement for services with Qwest, and that agreement expressly incorporates the arbitration clause in Tariff FCC No. 3, the customer has entered into a written agreement to arbitrate its claims against Qwest. The arbitration clause contained in Tariff FCC No. 3 then provides a uniform framework governing the arbitration process. Interpreting Tariff FCC No. 3 in this way not only gives force and effect to the arbitration clause, but also promotes the purposes of both the filed-rate doctrine and the FAA. Thus, the district court's interpretation of Tariff FCC No. 3 did not render the clause "self-defeating" as the Seventh Circuit held, 294 F.3d at 926; rather, it gave effect to the tariff's mandate that the arbitrability of claims is governed by the FAA.[6]

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[6] Even if it did, Qwest drafted this "self-defeating" language, and courts should not bend over backwards to aid the witless drafter.

The only law existing on the issue supports MECCAH's construction of the arbitration provision. MECCAH cited two cases to the Seventh Circuit in which long-distance customers had entered into agreements separate and apart from the tariff, which incorporated the terms of a tariff including an arbitration provision. In both cases, the courts compelled arbitration because the terms of the tariff were expressly incorporated by reference *into a prior written agreement between the parties to the suit*. *See Pay Phone Concepts, Inc. v. MCI Telecomm. Corp.*, 904 F.Supp. 1202, 1209 (D. Kan. 1995) and *MCI Telecomm. Corp. v. Happy the Glass Man, Inc.*, 974 F.Supp. 1016, 1020 (E.D. Ky. 1997).[7] Thus, in both cases, the customer could be said to have "agreed" to arbitrate by virtue of the separate written agreement incorporating the terms of the tariff. There is no indication in either case that the courts would have enforced the arbitration provision in the absence of the separate written agreement between the parties. Here, MECCAH did not enter into a written agreement with Qwest distinct from Qwest's tariff, and so unless the tariff itself constitutes a "written agreement for arbitration," (and, as demonstrated above, it does not), no written agreement to arbitrate exists on the facts of this case.

In sum, Qwest's arbitration clause provides that the FAA governs the arbitrability of claims. The FAA requires a written agreement for arbitration. MECCAH did not have the opportunity to review, much less bargain for, negotiate, or consider the desirability of arbitrating potential disputes with Qwest. Qwest did not affirmatively communicate the

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[7] In its zeal to enforce the arbitration provision in Qwest's tariff, the Seventh Circuit completely ignored these two cases and refused to address this argument altogether.

terms of the arbitration clause to its customers; instead Qwest slipped the clause into a voluminous, confusing and poorly-indexed tariff filed with a governmental agency in Washington D.C. Under these circumstances, the Seventh Circuit erred in holding that MECCAH "agreed" to arbitrate its claim against Qwest within the meaning of the FAA. Because the federal policy favoring arbitration agreements is meant to give force and effect to existing agreements, not create "agreements" out of thin air, it has no impact in this case.

This Court should grant certiorari to correct the Seventh Circuit's egregious error. The deleterious effects of the Seventh Circuit's holding will be far-reaching. Under the Seventh Circuit's holding, virtually every person in the United States has entered into a written agreement to arbitrate, because every person in the United States has accepted service from a company in a tariffed industry. Further, the evidence in this case showed that inserting arbitration clauses in tariffs is an industry-wide practice in the telecommunications field. According to the Seventh Circuit, such arbitration provisions are binding regardless of the fact that compelling arbitration under the circumstances defeats the goals of the filed rate doctrine and makes a mockery of this Court's mandate that arbitration is a matter of "consent, not coercion." *Allied-Bruce Terminix Cos.*, 513 U.S. at 270.

B. *The Panel Erroneously Held That Any Questions as to the Enforceability of the Arbitration Provision Must Be Raised Before the FCC in the First Instance.*

1. MECCAH's Claims Are Not Arbitrable under Case Law Interpreting the FAA.

In the proceedings below, MECCAH made two compelling arguments as to why its claim was not arbitrable even if it was determined that MECCAH "agreed" to arbitrate by accepting service under Qwest's tariff. First, MECCAH argued that its claim was not arbitrable because Qwest's arbitration provision forced MECCAH to waive federally protected remedies, namely the right to seek attorneys' fees and costs under the Communications Act. This argument is based on a line of cases which were all decided *under the FAA*. *See, e.g., Perez v. Globe Airport Security Serv., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *reh'g and reh'g en banc denied*, 273 F.3d 1118, *vacated by stipulation*, 294 F.3d 1275; *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999); *Graham Oil Co. v. ARCO Prod. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994), *cert. denied*, 516 U.S. 907; *Humana, Inc. Managed Care Litig.*, 285 F.3d 971, 973-74 (11th Cir. 2002), *cert. granted, Pacificare Health Systems, Inc. v. Book*, - - S.Ct. - -, 2002 WL 1906592 (2002).

MECCAH also argued and developed an undisputed factual record that Qwest's arbitration provision was unenforceable with respect to MECCAH's small dollar Communications Act claim because it imposes prohibitively expensive arbitration costs (more than 30 times the amount of MECCAH's claim). This argument is based on this Court's decision in *Green Tree Fin. Corp.-Alabama v. Randolph*, 531

U.S. 79 (2000). *Green Tree* was also decided *under the FAA*.[8]

The Seventh Circuit, while including extensive dicta on both of these issues in its opinion, incredibly held that such arguments had to be presented to the FCC in the first instance due to the FCC's exclusive jurisdiction over filed tariffs. The Seventh Circuit construed MECCAH's arguments as attempts to "invalidate" a tariff and held that "[i]t is the regulatory agency (here the FCC) that possesses exclusive authority to set aside rates, terms, conditions and other ingredients of a tariff." *Metro East*, 294 F.3d at 927.

2. *Referral to the FCC Is Inappropriate in this Case.*

Forcing MECCAH to resort to the FCC will not promote the goals of the doctrine of primary jurisdiction. The primary jurisdiction doctrine does not mandate referral to the FCC every time a telecommunications issue arises. Rather, as this Court has held, "[n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it services will be aided by its application in the particular litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). The central purposes of the primary jurisdiction doctrine are ensuring uniformity and allowing courts to take advantage of

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[8] There is another very important reason why MECCAH's claim should be deemed non-arbitrable. If MECCAH prevailed in the arbitration, and Qwest changed its PICC billing practices with respect to MECCAH only as a result of the arbitration, its conduct would likely be considered discriminatory under the FCC's standards.

the expert and specialized knowledge of the agency involved. *Id.*

a. MECCAH Does Not Seek to Invalidate Qwest's Tariff.

In general, referral to the FCC is appropriate in two situations. The first is when a customer seeks to invalidate or alter the terms of a tariff. *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (citing *United States v. Western Pacific R.R. Co.*, 352 U.S. at 63-65). This rule is inapplicable in this case, because MECCAH does not seek to invalidate any portion of Qwest's tariff. MECCAH's underlying claim seeks to enforce, not invalidate, Qwest's tariff. And MECCAH does not seek to invalidate Qwest's arbitration provision across the board; it simply seeks a ruling that its claim is not arbitrable under the FAA. Notably, Qwest's tariff specifies that the arbitrability of claims is to be governed by the FAA. Where a case involves the reasonableness of a tariff provision as applied to a particular person, the doctrine of primary jurisdiction has been held not to apply. *E.g., Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365 (9th Cir. 1985).

If the Court had refused to compel arbitration on the basis of one or both of MECCAH's arguments as to the non-arbitrability of its claim, Qwest's arbitration provision would still have effect. There are numerous situations in which arguments under *Green Tree* and *Perez* simply could not be made. For example, one of Qwest's customers could have a breach of contract claim or a billing dispute against Qwest not brought under a fee-shifting statute like the Communications Act, thus precluding any *Perez*-type of argument. Similarly, a customer might have a claim worth an amount sufficient to make arbitration a realistic alternative under the principles

discussed in *Green Tree*. In such cases, Qwest's arbitration provision would retain its teeth. So MECCAH does not seek to invalidate Qwest's tariff; it merely seeks a ruling that its claim is not arbitrable on the facts of this case. Because MECCAH does not seek to invalidate any portion of Qwest's tariff, the Seventh Circuit erred in holding that MECCAH's argument was for the FCC alone under the doctrine of primary jurisdiction.

b. Agency Expertise Is Not Required.

Next, referral under the doctrine of primary jurisdiction is appropriate when a court wishes to take advantage of agency expertise. *United States v. Western Pacific R.R. Co.*, 352 U.S. at 64. This rule is also inapplicable in the case at bar. Courts, not the FCC, have expertise in the enforceability of arbitration provisions and the scope of the FAA. As this Court has made clear, the question of arbitrability is "undeniably an issue for judicial determination." *AT&T v. Communications Workers of America*, 475 U.S. at 649. MECCAH's arguments based on *Green Tree* and *Perez* raised questions of the arbitrability of MECCAH's claim, not the merits of the underlying claim. The Seventh Circuit's decision puts MECCAH in the ridiculous position of either arbitrating its $80 claim or challenging the arbitration provision in a lengthy process before a federal agency more familiar with access codes than arbitration clauses.

c. Referral Will Delay the Proceedings and Provide No Benefit.

Finally, the Seventh Circuit failed to consider the inordinate delay that referral to the FCC would likely cause

in the adjudication of the case.[9] A court "should invoke primary jurisdiction and defer only if the benefits of obtaining the agency's aid outweigh the need to resolve the litigation expeditiously." *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1038 (10th Cir. 1993). "'Agency decisionmaking often takes a long time' and the delay 'imposes enormous costs on individuals, society, and the legal system.'" *Nat'l Communications Ass'n, Inc. v. AT&T Co.*, 46 F.3d 220, 225 (2nd Cir. 1995) (reversing referral, because "potential delay of even two years more than outweighs any benefit"). MECCAH's attempt to secure a determination that its claim is not arbitrable under precedent interpreting the FAA is unlikely to receive prompt attention from the FCC. *See In the Matter of Implementation of the Telecommunications Act of 1996*, 12 F.C.C.R. 22,497, ¶ 37 at 22,513.

Moreover, referral to the FCC will not provide any benefit to this litigation. As noted above, MECCAH's arguments regarding the arbitrability of its claim were based solely on judicial precedent issued under the FAA. In directing Plaintiffs to present the issues to the FCC in the first instance, the Seventh Circuit ignored cases from this Court holding that "the interpretation of judicial precedent is a subject upon which this Court may pass judgment independent of the Commission's views." *FPC v. Pacific Power & Light Co.*, 307 U.S. 156, 160 (1939). It is nonsensical and inefficient to force a party to present such arguments to the

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[9] Referral to the administrative process is notoriously slow. *See, e.g., AT&T Co. v FCC*, 978 F.2d. 727, 731 (D.C. Cir. 1992) (noting that FCC had taken over two years to issue a non-definitive ruling on an issue), *cert. denied, MCI Telecommunications v. AT&T Co.*, 509 U.S. 913 (1993).

FCC in the first instance, when the losing party could seek judicial review of the FCC's determination, and the reviewing court would owe that determination no deference. This Court has cautioned that in deciding whether to refer to an administrative agency under the doctrine, "a court must balance advantages of applying the doctrine of primary jurisdiction against potential costs resulting from complications and delay in administrative proceedings." *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 321 (1973).

The Seventh Circuit's erroneous holding will impact almost every person and business in the Seventh Circuit. Again, any person or entity wronged by a company in a tariffed industry whose tariff contains an arbitration provision will have to resort to the administrative agency in the first instance to get a determination as to whether the arbitration clause is enforceable under law established by courts. In short, the Seventh Circuit erred in holding that referral to the FCC is required under the circumstances of this case, and this Court should grant certiorari to correct that erroneous holding.

CONCLUSION

The notion that MECCAH or any other long distance customer "agreed" to arbitrate all claims against its long distance carrier by accepting service from the carrier governed by a tariff containing an arbitration clause is a legal fiction created by the Seventh Circuit. In enforcing Qwest's arbitration clause, the Seventh Circuit stripped MECCAH and Qwest's other Centrex customers of their right to hold Qwest accountable for cheating them out of potentially millions of dollars.

In this critical case of first impression in the country, the Seventh Circuit ignored the only cases that shed any light on the issue, and neglected to analyze whether compelling arbitration in this instance furthers the goals of the FAA or the filed-rate doctrine. The Seventh Circuit's opinion kills private enforcement of the FCA, and any other federal or state statute creating a private remedy for persons or entities damaged by a company in a tariffed industry, which includes virtually all of the utilities and all of the transportation industry.

For these reasons, this Court should grant MECCAH's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-1359

[Filed August 16, 2002]

METRO EAST CENTER FOR CONDITIONING AND HEALTH, Plaintiff-Appellee,	)
v.	)
QWEST COMMUNICATIONS INTERNATIONAL, INC., Defendant-Appellant.	)

Appeal from the United States District Court
for the Southern District of Illinois
No. 01-CV-0399-DRH
David R. Herndon, Judge

JUDGES:
Before Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

ORDER

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on July 11, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-1359

[Filed June 27, 2002]

METRO EAST CENTER FOR CONDITIONING AND HEALTH, Plaintiff-Appellee,	)
v.	)
QWEST COMMUNICATIONS INTERNATIONAL, INC., Defendant-Appellant.	)

Appeal from the United States District Court
for the Southern District of Illinois
No. 01-CV-0399-DRH
David R. Herndon, Judge

JUDGES:
Before EASTERBROOK, MANION, and KANNE, Circuit Judges.

OPINION

EASTERBROOK, *Circuit Judge*. When Metro East Center for Conditioning and Health chose a new vendor for local phone service, it neglected to name an interstate carrier, so one was assigned at random-Qwest Communications, which played that role for six months (February through July 2001) before Metro East specified a different carrier. Qwest's tariff on file with the Federal Communications Commission had two pertinent provisions: First, it set the monthly minimum fee per line (the "presubscription charge") that each customer must pay; second, it provided that any dispute would be resolved by arbitration. (We use the past tense because the tariff was canceled on July 31, 2001, as part of the FCC's detariffing program. Today Qwest uses a published statement of rates and rules, which presumably may be varied by customer-specific contracts. But the tariff was in force when the parties' dispute arose and thus governs its resolution.) Metro East contends that it uses Centrex service so that the monthly fee was 45 [cent] per line; Qwest believes that Metro East is not a Centrex user and that the tariff therefore specified a monthly charge of $ 4.25. The total in contention is about $ 80, and the simplified procedures of arbitration are especially attractive for small-stakes disputes. But Metro East believes that the controversy is *so* small that neither arbitration nor ordinary litigation makes sense. It filed this suit seeking to represent a class of all customers who qualify for but did not receive the 45 [cent] monthly rate under the tariff. Qwest replied with a motion to dismiss the suit and compel arbitration.

Qwest's Interstate Tariff No. 3 says, among other things:

> Any claim, controversy or dispute, whether sounding in contract, statute, tort, fraud, misrepresentation, or other legal theory, related directly or in-directly to the Services, whenever brought and whether between the Company and the Customer or between the Company or the Customer and the employees, agents or affiliated businesses of the other party, shall be resolved by arbitration as prescribed in this section. The Federal Arbitration Act, 9 U.S.C. § § 1-15, not state law, shall govern the arbitrability of all claims.

Under § 3 of the Federal Arbitration Act, 9 U.S.C. § 3, only the parties' "agreement" supports arbitration. Yet a tariff is a set of terms created and filed unilaterally by a carrier. Customers do not "agree" to these terms, though they are binding unless the federal agency with which they have been filed disapproves them. *See, e.g., AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998). No private agreement can displace a tariff's terms. *See Maislin Industries, U.S., Inc. v. Primary Steel*, Inc., 497 U.S. 116, 111 L. Ed. 2d 94, 110 S. Ct. 2759 (1990). Because the Federal Arbitration Act makes an "agreement" essential, the district court concluded, Qwest's customers need not arbitrate any dispute with it. 182 F. Supp. 2d 726 (S.D. Ill. 2002). The order denying Qwest's motion to compel arbitration is immediately appealable under 9 U.S.C. § 16(a)(1)(B).

The district court's approach has a "gotcha!" quality: The clause requiring arbitration refers to the Federal Arbitration Act and as a consequence precludes arbitration. Yet it is almost never right to read legal language as self-defeating. The district judge understood the clause as saying: "Every dispute must be arbitrated, provided, however, that no dispute is arbitrable." Why would someone put such a clause in a tariff, a contract, or any other document? People draft documents to achieve *some* objective, and although the meaning of words can be elusive even after taking into account both linguistic and economic contexts, *see Beanstalk Group, Inc. v. AM General Corp.*, 283 F.3d 856 (7th Cir. 2002), and some words may turn out to be redundant or otherwise carry no weight, it is not sensible to construe a substantial passage of a legal text as pointless. When one sentence seems to cancel out the rest of a sub-section, it is essential to ask whether that sentence *must* devastate its surrounding language. Is there no alternative reading of either the contract or the Arbitration Act that will enable the whole clause to survive?

It isn't hard to think of one: An "agreement" for purposes of § 3 means no more than an offer and acceptance that produces a legally binding document. Tariffs, like contracts, have that quality. The tariff is an offer that the customer accepts by using the product. The terms have legal effect; indeed, by virtue of federal law a tariff is more conclusive than a contract and is said to have the status of a regulation, see *Cahnmann*, 133 F.3d at 488, though a tariff also may be enforced through suit just as a contract may be enforced. No surprise that we have referred to tariffs as a species of contract. *See, e.g., Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001). Accord, *Atlantic & Gulf*

Stevedores, Inc. v. Alter Co., 617 F.2d 397, 401 n. 16 (5th Cir. 1980); *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338, 1340 (8th Cir. 1971). Tariffs differ from private contracts only to the extent that they are not subject to alteration one customer (or one clause) at a time or to nullification by a court on grounds such as unconscionability. Instead a tariff must be enforced as written unless the regulatory agency intervenes. Metro East supposes that to form an "agreement" with Qwest it must engage in individual negotiation, clause by clause. A tariff is a take-it-or-leave-it proposition and thus not an "agreement" by these lights. Yet we have held that form contracts, offered on a take-it-or-leave-it basis, are agreements for purposes of the Arbitration Act. *See, e.g., Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991) (enforcing a forum-selection clause included among three pages of terms attached to a cruise ship ticket). Tariffs are no different on this dimension.

Arbitration often comes with the territory, so to speak-for example, with a job or with membership in the National Association of Securities Dealers. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995); *J.E. Liss & Co. v. Levin*, 201 F.3d 848 (7th Cir. 2000). Although these requirements may be non-negotiable--one cannot join the NASD without accepting its arbitration regimen, and often an investor cannot trade securities *through* NASD members without committing to arbitrate--they remain "agreements" because the person could have chosen to do

something else. A would-be securities dealer may elect a different occupation; by making a living at securities trading he agrees to live by the rules applicable to securities dealers. Likewise a business such as Metro East that wants to make interstate phone calls can shop among tens of rivals for the best combination of price and terms. If customers value the ability to litigate by more than the incremental cost of litigation compared with arbitration, then one or more of the carriers will offer that option. Even if none does, the price the carriers charge in competition will reflect the terms of the transaction.

So this tariff does not suffer from a self-inflicted wound. Metro East has "agreed" to arbitrate within the meaning of § 3. Nonetheless, Metro East insists, it should be entitled to litigate because arbitration is too expensive for an $ 80 dispute (the filing fee alone is greater), because arbitrators need not entertain class actions, and so on. This is the sort of litany that the Federal Arbitration Act is supposed to silence; arbitration has disadvantages compared with litigation but has benefits too, and private parties are entitled to choose in order to maximize their own satisfaction. An arbitral forum can serve as a sort of small-claims tribunal in a way that a federal district court cannot. If arbitration offers benefits to Qwest and detriments to customers such as Metro East, these benefits are reflected in a lower cost of doing business that in competition are passed along to customers. There is *lots* of competition in interstate telecommunications service. Customers therefore are compensated through lower rates for any net loss they may experience in arbitration. They can't accept the lower rates (recall that Metro East contends that it is entitled to an especially favorable fee of 45 [cent] per line per month) while avoiding the means that made lower

rates possible.

What is more, arbitration may offer net benefits to all concerned. The filing fee for arbitration exceeds the stakes of this $ 80 dispute--but so does the filing fee for litigation in a federal district court, and the discovery procedures of litigation may be more expensive for both sides than are the procedures used in arbitration. Qwest's tariff calls for arbitration under the auspices of the American Arbitration Association, using its expedited procedures without discovery. This curtails the cost of the proceedings and allows swift resolution of small disputes on written submissions. A firm such as Metro East can provide documents (from itself or its local carrier) supporting its contention that it has Centrex service without opening itself to expensive discovery. This seems to give the customer the upper hand: without discovery, Qwest would not find it easy to meet Metro East's proof about the nature of its phone switch.

None of this matters, however, because the decision is not ours to make. Under the Arbitration Act, expressly incorporated into the tariff, an agreement to arbitrate must be enforced to the same extent as any other contract would be enforced. Metro East does not contend that any legal rule would nullify terms of the tariff viewed as ordinary contractual clauses. 9 U.S.C. § 2. To the extent that Metro East argues that arbitration is unfair or unjust because it interferes with some other federal objective--the sort of argument offered by four Justices in dissent in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000)- it runs smack into the filed-rate doctrine (sometimes called the filed-tariff doctrine because it covers terms as well as rates). It is the regulatory agency

(here the FCC) that possesses exclusive authority to set aside rates, terms, conditions, and other ingredients of a tariff. By incorporating the Federal Arbitration Act, the tariff authorizes the court to decide whether a dispute is arbitrable under § 3 (as we have done); this role does not offend the filed-tariff doctrine because the tariff itself commands application of the Arbitration Act's standards. But any broader claim, such as that arbitration is an inappropriate practice in the telecommunications business or transgresses some aspect of the federal statutes that the FCC administers, is an argument for the FCC alone. A customer who objects to any part of a tariff may ask the FCC to suspend or annul the tariff and is entitled to judicial review of an unfavorable decision. 47 U.S.C. § § 204(a)(2)(C), 402. But Metro East has not initiated an administrative proceeding--and Qwest informed us at oral argument that none of its other customers has sought administrative review of the arbitration requirement nor, to its knowledge, has *any* customer of *any* carrier protested before the FCC *any* arbitration provision in a telecommunications tariff. This suggests that most customers find arbitration a valuable cost-saver; certainly it affords no reason to suppose that the FCC thinks arbitration improper and just hasn't got 'round to purging it from Qwest's Interstate Tariff No. 3.

Metro East relies heavily on *McCaskill v. SCI Management Corp.*, 285 F.3d 623 (7th Cir. 2002), for the proposition that an arbitration clause is invalid if the parties' agreement includes a provision for the allocation of attorneys' fees at variance with otherwise-applicable law. According to Metro East, *McCaskill* held an arbitration agreement covering employment disputes invalid because it adopted the American Rule under which each side bears its own legal expenses, *see Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S.

240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975), while Title VII of the Civil Rights Act of 1964 creates a fee-shifting regimen allowing a prevailing employee to recover legal fees from the employer. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). This approach applies here, Metro East contends, because the Federal Communications Act provides for fee shifting, 47 U.S.C. § 206, while Qwest's tariff specifies use of the American Rule. Metro East overstates *McCaskill's* holding, because the employer in that case *conceded* that the American Rule would not be used in the arbitration and forfeited additional arguments as well. The employer did not, for example, contend in *McCaskill* that it is the arbitrator, not a judge, who must determine in the first instance what rules for the allocation of legal expenses are applicable. Although some language in *McCaskill* could be read to decide issues on which the parties had not engaged, rehearing has been granted in that case to consider more fully the effects of the employer's forfeitures. Because *McCaskill* has been withdrawn, it remains open to decision in this circuit whether parties to a contract may agree to replace a fee-shifting system with the American Rule, whether the right party to make this decision is the arbitrator or the judge, and whether, if a contractual choice of the American Rule is indeed forbidden, this spoils the entire arbitration clause.

As far as we know, the Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver (as § 206 of the Communications Act does not). Every day criminal defendants waive the most fundamental rights, such as the right to jury trial and proof beyond a reasonable doubt, in exchange for lower sentences or other benefits. *See United States v. Krilich*, 159 F.3d 1020

(7th Cir. 1998) (collecting authority). Public employees can and do waive constitutional rights--including the right of political speech--in exchange for employment. *See, e.g., CSC v. Letter Carriers*, 413 U.S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973); *Snepp v. United States*, 444 U.S. 507, 62 L. Ed. 2d 704, 100 S. Ct. 763 (1980). Political candidates can surrender some of their speech rights in exchange for a federal subsidy. *See Buckley v. Valeo*, 424 U.S. 1, 57 n.65, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). Perhaps, then, telephone users can surrender rights to attorneys' fees in return for more immediate benefits, such as lower monthly charges. Contracts about attorneys' fees, in particular, have been challenged and sustained. *Evans v. Jeff D.*, 475 U.S. 717, 89 L. Ed. 2d 747, 106 S. Ct. 1531 (1986), a case that *McCaskill* did not mention, holds that plaintiffs may forego attorneys' fees under 42 U.S.C. § 1988. We know from *Newton v. Rumery*, 480 U.S. 386, 94 L. Ed. 2d 405, 107 S. Ct. 1187 (1987), that it is possible to waive an entire civil-rights claim; waiver of fee-shifting is a subset of that broader agreement. Cf. *Dye v. Wargo*, 253 F.3d 296 (7th Cir. 2001). Although the agreements in *Evans* and *Newton* were forged after the events that gave rise to the claims, while here the deal came earlier, this distinction is not necessarily dispositive. A pre-versus post-dispute line has been drawn by a few statutes, such as the Fair Labor Standards Act, but § 206 of the Communications Act is not among them.

One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly. Instead of offering a benefit only to a person who is required to arbitrate or litigate, a fee-shifting statute may provide a benefit more widely to the extent that it changes the terms of trade; the customer sells the entitlement back to the phone

company for cash (in the form of lower rates). The more valuable the right, the more the customer can get in exchange. Thus identifying a high-value legal right does not show that the right must be off limits to economic activity between consenting adults. The Supreme Court has held that cognovit notes--that is, agreements bypassing suit and permitting the lender to register a judgment without judicial approval, in exchange for a lower rate of interest-- are compatible with the Constitution, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775, 61 Ohio Op. 2d 528 (1972), and we recently enforced a deal with a similar confession-of-judgment feature. *See Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000). A contract specifying use of the American Rule in arbitration is well short of a cognovit clause; and if the latter can be valid, why not the former?

Once again, however, the decision is not ours to make. If the provision in the tariff calling for use of the American Rule is unlawful under the Communications Act, then the right forum for complaint is the Federal Communications Commission-- though it is conceivable that the arbitrator may play a role too. Many decisions, of which *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967), is the leading example, hold that defenses to performance--even those that logically defeat arbitration--belong to the arbitrator as long as there is no doubt that the parties agreed to arbitrate. *See Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256 F.3d 587 (7th Cir. 2001) (discussing this doctrine and its limits). Three courts of appeals have held that under *Prima Paint* the arbitrator determines whether contractual limitations on remedies are valid. *See Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001); *MCI*

Telecommunications Corp. v. Matrix Communications Corp., 135 F.3d 27, 33 n.12 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997). How this interacts with the filed-rate doctrine is an open question. An arbitrator has no more power to alter a tariff's rate than does a judge; and because *Central Office Telephone* treats conditions and other tariff terms as part of the rates, it may follow that an arbitrator must take the whole tariff as he finds it, in order to avoid any possibility of discriminatory application (that bugbear of rate-regulation systems, and the main target of the filed-rate doctrine). This suggests that *only* the FCC may consider an objection to the tariff's specification of the American Rule. All that matters today, however, is the doctrine that a court cannot annul any part of a tariff, no matter how telling the objection.

Metro East has one last argument: that the district court did not "invalidate" any part of a tariff (which the filed-tariff doctrine forbids) but instead held the arbitration clause "unenforceable". That's your classic distinction without a difference. What, exactly, is the legal line between holding part of a tariff "invalid" and holding it "unenforceable"? No case of which we are aware holds that a court may declare part of a tariff "unenforceable" and refuse to apply it. That would invade the province of the agency just as surely as any declaration that the clause is "invalid."

Qwest is entitled to enforce its tariff unless and until the FCC intervenes. Accordingly, the district court should have granted Qwest's motion to compel arbitration. Metro East tells us that it views arbitration as pointless; that is its call, for no provision in the tariff *requires* the customer to pursue every dispute to the bitter end. A customer may decide

not to throw good money after bad. Therefore the judgment of the district court is reversed, and the case is remanded for dismissal unless Metro East promptly informs the district judge that it prefers to arbitrate. In that event, the district court should enter an order staying the litigation and requiring the parties to arbitrate this $ 80 dispute.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 01-CV-0399-DRH
[Filed January 28, 2002]

METRO EAST CENTER FOR CONDITIONING AND HEALTH, Individually and Behalf of All Others Similarly Situated, Plaintiffs,	)
vs.	)
QWEST COMMUNICATIONS INTERNATIONAL, INC., Defendant.	)

JUDGES:
DAVID R. HERNDON, United States District Judge.

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction

On June 18, 2001, Metro East Center for Conditioning and Health filed suit against Qwest Communications, alleging

that Qwest has been charging it a presubscribed interexchange carrier charge ("PICC") in violation of a Federal Communications Commission regulation, **47 C.F.R. § 69.153,** and in excess of the appropriate rate as set forth in Qwest's FCC tariff (Doc. 1). On August 20, 2001, Qwest filed a motion to dismiss this action asserting that the FCC has primary jurisdiction over this case because Metro East seeks application and interpretation of a FCC regulation (Doc. 17). On September 13, 2001, Metro East voluntarily dismissed Count I of its Complaint which alleges a violation of a FCC regulation (Doc. 33). Therefore, Metro East now only alleges that the PICC charged is in excess of the rate set forth in Qwest's tariff. After Metro East voluntarily dismissed Count I of its Complaint, Qwest sent a letter to Metro East indicating its intent to invoke the "tariff provision requiring arbitration." Consequently, Metro East filed a "motion for the declaration of the inapplicability/unenforceability of arbitration clause" (Doc. 32) and Qwest filed a motion to compel arbitration (Doc. 34). On January 18, 2002, the Court held a hearing on these motions and took the matter under advisement. The Court now finds that Metro East's claim is not subject to arbitration and that Qwest's motion to dismiss must be denied.

II. Analysis

A. Arbitration

Qwest's tariff, filed with the FCC, contains an arbitration clause which requires that:

> Any claim, controversy or dispute, whether sounding in contract, statute, tort, fraud,

> misrepresentation, or other legal theory, related directly or indirectly to the Services, whenever brought and whether between the Company and the Customer or between the Company or the Customer and its employees, agents or affiliated businesses of the other party, shall be resolved by arbitration as prescribed in this section. The Federal Arbitration Act, 9 U.S.C. § 1-15, not state law, shall govern the arbitrability of all claims.

(Doc. 37, Exh. A). Qwest, therefore, argues that Metro East's claim is subject to mandatory arbitration. In response, Metro East argues that the arbitration clause contained in Qwest's tariff is unenforceable because it is not a "written agreement to arbitrate" as required by the FAA.[1]

Qwest's tariff provides that the Federal Arbitration Act "shall govern the *arbitrability* of all claims." (Doc. 37, Exh. A)(emphasis added). The Court must, therefore, turn to the FAA to determine whether Metro East's claim is arbitrable. Section 3 of the FAA provides:

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[1] Metro East also advances several arguments challenging the validity of the tariff's arbitration provision. Qwest argues that the Court cannot entertain Metro East's challenges to the *validity* of the arbitration clause because a court cannot modify or invalidate the terms of a tariff. ***Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001).** Regardless of whether Qwest is correct in its assertion, the Court need not address Metro East's challenges to the validity of the arbitration provision because the issue can be resolved upon the plain reading of the Federal Arbitration Act and Qwest's tariff.

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Therefore, in order to stay proceedings pursuant to section 3, the movant must satisfy two conditions: (1) the issue must be referable to arbitration under a written agreement to arbitrate and (2) the movant must not be in default in proceeding with arbitration. ***Merit Ins. Co. v. Leatherby Ins. Co.*, 581 F.2d 137, 142 (7th Cir. 1978).** Although national policy encourages arbitration of disputes, submission to arbitration is consensual, not coercive. ***See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 62, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995).** Thus, a court cannot force a party to arbitrate unless that party has entered into a contractual agreement to do so. ***See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995).**

The need for an agreement as a condition to gaining access to the provisions of the FAA manifests itself through various provisions of the Act. Section 2 of the FAA provides that "[a] written provision in any . . . contract, or an

agreement in writing to submit to arbitration," is valid and enforceable "save upon such grounds as exist at law or equity for the revocation of any contract." **9 U.S.C. § 2.** Similarly, section 4 states that "if the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." **9 U.S.C. § 4.** From this review, "it is apparent that determining whether there was a written agreement to arbitrate the controversy in question is the first and crucial step in any enforcement proceeding before a district court." ***MCI Telecommunications Corp. v. Exalon Indus., Inc.*, 138 F.3d 426, 429 (1st Cir. 1998).** In order to determine whether the parties intended to submit to arbitration, a court reviews the contract (if any) at issue. ***See AT&T Technologies v. Communications Workers of Am.*, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986).** In doing so, the court looks to contract law. ***Mastrobuono*, 514 U.S. at 57, 62.** Therefore, it is necessary to show a manifestation of mutual assent or a meeting of the minds. ***Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868, 870-71 (7th Cir. 1976).**

In this case, there was no contract between Qwest and Metro East. The arbitration clause at issue is contained in a tariff filed with the FCC. The unilateral and nonnegotiable nature of a tariff filed with the FCC negates any contention that a tariff constitutes an "agreement" between parties. Qwest has repeatedly and correctly asserted that a tariff is *not* a contract. ***MCI Telecommunications Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993).** It cannot now argue that the arbitration clause contained in the tariff is part of a contract

by which the parties agreed to arbitrate.[2]

Qwest also argues that under the filed-rate doctrine, its valid tariff, filed with the FCC, "conclusively and exclusively controls the rights and liabilities between a carrier and its customer." ***Graham*, 7 F.3d at 479.** Therefore, Qwest argues, it does not matter that Metro East did not assent to the particular terms of the tariff. Even assuming that Qwest is correct in arguing that its tariff conclusively controls the rights and liabilities of the parties, Qwest's tariff requires that the FAA "govern the *arbitrability* of all claims," and the FAA requires a written agreement to arbitrate. ***Exalon Indus.*, 138 F.3d at 429.** An "agreement" presupposes a mutual assent to the terms. ***Interstate Indus.*, 540 F.2d at 870-71.** Under the analysis above, the arbitration clause in Qwest's tariff does not constitute a written agreement to arbitrate. The Court, therefore, finds that Qwest and Metro East clearly did not enter into a contractual agreement to arbitrate. Accordingly, the Court **GRANTS** Metro East's "motion for the declaration of the inapplicability/unenforceability of arbitration clause" (Doc. 32) and **DENIES** Qwest's motion to compel arbitration (Doc. 34).

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[2] Qwest relies upon two district court cases to argue that the arbitration clause contained in its tariff is enforceable. ***Pay Phone Concepts, Inc. v. MCI Telecommunications Corp.*, 904 F. Supp. 1202 (D. Kan. 1995); *MCI Telecommunications Corp. v. Happy the Glass Man, Inc.*, 974 F. Supp. 1016 (E.D. Ky. 1997).** These cases are inapposite. First, district court cases are not binding on this Court. Moreover, both cases are distinguishable from the case at bar. In both ***Pay Phone*** and ***Happy the Glass Man***, the tariff's arbitration provision was expressly incorporated by reference into a prior written agreement between the parties. ***Id.***

B. Motion to Dismiss

Qwest filed a motion to dismiss this action asserting that the FCC has primary jurisdiction over Metro East's claims. The doctrine of primary jurisdiction should be applied when the complaint raises a question of the validity of a rate or practice included in a tariff filed with an agency, particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency. ***Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976).** However, claims brought asserting that the tariff (fair on its face) has been violated are properly brought before a court, not an administrative agency. ***Pennsylvania v. Puritan Coal Mining Co.*, 237 U.S. 121, 131-32, 59 L. Ed. 867, 35 S. Ct. 484 (1915).** In its motion to compel arbitration and during oral argument, Qwest conceded that because Metro East now only claims that Qwest violated its tariff, the FCC does not have primary jurisdiction over this action. Qwest, however, argues that to the extent that Metro East challenges the *validity* of the arbitration provision contained in the tariff, the FCC does have primary jurisdiction over that issue. Because the Court finds that, under a plain reading of the FAA and Qwest's tariff, the parties did not enter into a written agreement to arbitrate, Metro East's challenges to the *validity* of the arbitration clause are moot as is Qwest's motion to dismiss. Accordingly, the Court **DENIES** Qwest's motion to dismiss (Doc. 17).

III. Conclusion

The Court **GRANTS** Metro East's "motion for the declaration of the inapplicability/unenforceability of arbitration clause" (Doc. 32), **DENIES** Qwest's motion to

compel arbitration (Doc. 34), and **DENIES** Qwest's motion to dismiss (Doc. 17). Further, because the allegations and circumstances of this case have changed since Metro East filed its motion for class certification, the motion is **DENIED at this time** (Doc. 2), with leave to re-file.

IT IS SO ORDERED.

Signed this 28th day of January, 2002.

/s/ _____
DAVID R. HERNDON
United States District Judge